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No. 81-2301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THEODORE BRENNER, d/b/a TEDDY BRENNER ENTERPRISES,
Petitioner,

v.

WORLD BOXING COUNCIL AND JOSE SULAIMAN CHAGNON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF WORLD BOXING COUNCIL AND JOSE SULAIMAN CHAGNON, IN OPPOSITION

RICHARD M. COOPER
(Counsel of Record)
ELLEN S. HUVELLE
WILLIAMS & CONNOLLY
Hill Building
839 Seventeenth St., N.W.
Washington, D.C. 20006
(202) 331-3017
Attorneys for Respondents, World Boxing Council and Jose Sulaiman Chagnon

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a case involving an allegation of an antitrust conspiracy, the assertion of the Fifth Amendment privilege against self-incrimination by a non-party witness, under the control of none of the parties, and who is an alleged but unproved co-conspirator and who is under investigation by a grand jury at the time of trial, gives rise to an inference adverse to the defendant parties, who did testify fully.

2. Whether the evidence presented by plaintiff/petitioner in this case was sufficient to create an issue for the jury as to the existence of a conspiracy prohibited by § 1 of the Sherman Act.

3. Whether all disciplinary actions taken by private sports regulatory bodies, except possibly those directly relating to activities during sporting events, are *per se* violations of § 1 of the Sherman Act.

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BRIEF OF WORLD BOXING COUNCIL AND JOSE SULAIMAN CHAGNON, IN OPPOSITION

OPINIONS BELOW

Included in the appendix to this Brief in Opposition are the rulings of the District Court (i) excusing Don King as a witness; (ii) granting a directed verdict on petitioner's conspiracy claim; and (iii) refusing to instruct the jury that an inference adverse to the respondents arises from the assertion of the Fifth Amendment privilege by a witness.

STATEMENT OF THE CASE

The facts of this case are described in great detail in the opinion of the Court of Appeals, Pet. at 1957-70.[1]

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[1] "Pet." refers to the Petition for Certiorari. "J.A." refers to the Joint Appendix in the Court of Appeals. "Tr." refers to the transcript in the District Court.

In sum, the case involves three parties: the petitioner, Theodore Brenner ("Brenner"), a boxing matchmaker and self-described promoter; and the two respondents, the World Boxing Council ("WBC"), an international non-profit membership organization, which recognizes and regulates "WBC World Championship" boxing matches,[2] and Jose Sulaiman Chagnon ("Sulaiman"), the president of the WBC.[3] The WBC, acting through its Executive Committee and Sulaiman, suspended Brenner for multiple violations of the WBC rules, including the rule against breaches of commitments to the WBC. The suspension was to last until Brenner brought himself into compliance with the rules or satisfactorily explained why he should not be required to do so. Instead of taking either of those courses, Brenner sued under § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). He did not attack the substance of the WBC rules, but contended, rather, that his suspension was procedurally defective and that it resulted from an illegal conspiracy among the respondents and a promoter

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[2] The WBC is composed of seven continental federations, representing approximately 100 countries. It was formed in 1963 in order to promote uniformity and reciprocity in world championship boxing matches. Its principal functions are to recognize WBC world champion boxers in various weight divisions and to prescribe rules for fair competition for such championships. Over the years, the WBC has instituted programs (medical and life insurance and standardized medical exams) and regulations (anti-doping tests and rules relating to prohibited substances) to protect the fighters, and it has run training programs and enacted rules both to upgrade the quality of judges and referees and to standardize practices in the ring. Tr. 794-806. Its governing body, the Executive Committee, and its officers receive no compensation and have no commercial interest in boxing. Tr. 816-817.

[3] Sulaiman is a businessman by profession, but has, for over forty years, been involved in boxing as an avocation. Prior to becoming president of the WBC, he served as president of the Mexican Boxing Federation and president of the North American Boxing Federation. He has no commercial interest in boxing and serves as president of the WBC without pay. Tr. 790-793, 816-817.

named Don King.[4] Brenner did not include King as a defendant.

The case was tried to a jury in the Southern District of New York. At the close of the petitioner's case, the District Court granted a directed verdict for the respondents on petitioner's conspiracy claim. The remaining issue, concerning the validity of the suspension, was submitted to the jury, which returned a verdict for the respondents.[5]

Petitioner appealed to the United States Court of Appeals for the Second Circuit, which in a detailed opinion affirmed unanimously.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FIFTH AMENDMENT ISSUE POSED BY PETITIONER IS NOT PRESENTED BY THE RECORD IN THIS CASE, AND THE FIFTH AMENDMENT ISSUE THAT WAS PRESENTED BELOW WAS DECIDED CORRECTLY.

A. The Issue Posed by Petitioner is Not Presented by the Record in this Case.

The issue posed by Petitioner is whether, in a case where the plaintiff alleges an antitrust conspiracy, an inference adverse to the defendants arises when a co-

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[4] Brenner also alleged that the respondents coerced boxers to sign contracts with King and others; and that they manipulated ratings to favor boxers associated with King and others. The District Court granted a directed verdict for the respondents on each of these allegations, and petitioner has not pursued them in the Court of Appeals or in this Court.

[5] Respondents had asserted four counterclaims against Brenner. One was withdrawn prior to trial. J.A. 80a. At the close of all the evidence, the District Court granted a directed verdict for petitioner on two others. The jury found for the petitioner on the fourth counterclaim. No issue relating to the counterclaims was presented to the Court of Appeals, and none is raised in this Court.

conspirator who is not a party to the case asserts his Fifth Amendment privilege. That issue is not presented by the record in this case because there has been no finding (and there is no evidentiary basis for a finding) that the witness who asserted the privilege was in fact a co-conspirator.

The witness in question was Don King. Petitioner alleged that King was a co-conspirator of the defendants, but petitioner elected not to name King as a defendant. Had he chosen to sue King, he might have been entitled to an adverse inference *against King* from King's assertion of the privilege. But, as a result of petitioner's own strategy in designing his lawsuit, King was merely a non-party witness.

There was no finding that King was a co-conspirator. The District Court, after hearing all of petitioner's evidence, granted a directed verdict for the respondents on the conspiracy claim. The Court of Appeals unanimously affirmed that judgment. Consequently, as the case reaches this Court, King is not a co-conspirator.

The question whether the evidence was sufficient to present a jury question on the conspiracy issue is not one that warrants the grant of the writ. Should the Court be interested, however, in the sufficiency of the evidence on the conspiracy claim, it will find that there was no evidence that respondents conspired with King. The relevant evidence is summarized and analyzed in the opinion of the Court of Appeals, Pet. at 1766-69. The only conclusion permitted by the evidence is that drawn by both the District Court and the unanimous Court of Appeals: "The record does not support a reasonable inference of a conspiracy among appellees and King to advance the interests of King over those of Brenner. Rather, the only conclusion that can be drawn is that the WBC and Sulaiman aided *Brenner* . . . ." Pet. at 1768 (emphasis added).

Therefore, this case does not present any issue concerning the effect of an assertion of the Fifth Amendment privilege by a co-conspirator.

B. The Fifth Amendment Issue Was Decided Correctly by the District Court and the Court of Appeals.

Petitioner sought to compel King's testimony at a time when, as petitioner well knew, "King was the subject of a grand jury investigation involving some of the identical claims raised by Brenner . . . ." Pet. at 1770. The first question, then, was whether King properly asserted his privilege. The second was whether any inference adverse to *the WBC and Sulaiman* arose from *King's* assertion of the privilege.[6]

The District Court, in sustaining King's assertion of the privilege, correctly followed *Hoffman* v. *United States*, 341 U.S. 479 (1951), as the Court of Appeals held. Pet. at 1770. Contrary to the references in the Petition (at pp. i,4) to a "blanket invocation" of the privilege, King asserted the privilege question by question, and the District Court reviewed the propriety of his assertion of it question by question. Pet. at 1770.

No adverse inference *against the WBC and Sulaiman* may be drawn from *King's* assertion of the privilege. No case holds that such an inference against a party to a case may be drawn from the assertion of the privilege by a witness whom the party does not control. *Baxter* v. *Palmigiano*, 425 U.S. 308, 319 (1976), and the other cases cited in Pet. at 6 (with one exception)[7] involved

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[6] Sulaiman testified fully at the trial, both on his own behalf and as the president of the WBC.

[7] The exception is *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959). That was a criminal case in which the prosecutor called three witnesses who asserted the privilege and in his summation commented on the refusal of one of the three to testify. The conviction was reversed for failure of the trial court to admonish the jury "that they must not use the refusal as evidence of what the answer would have been." 262 F.2d at 538. The Court of Appeals commented, "Such refusals have been uniformly held not to be a permissible basis for inferring what would have been the answer . . . ." The decision hardly supports the drawing of an adverse in-

the assertion of the privilege *by a party* and the drawing of an inference *against the party who asserted the privilege.* Here, as the District Court pointed out in ruling that petitioner could not call King as a witness solely to have him assert the privilege, "King was deliberately not named a party defendant and is merely a witness . . . ." J.A. 93a.[8] His assertion of the privilege is therefore irrelevant, for it is well settled that no inference adverse to a party may be drawn from the refusal of a non-party to testify. *See, e.g., United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973); *Bowles* v. *United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995 (1971); *United States* v. *Atnip*, 374 F.2d 720, 723 (7th Cir. 1967); *United States* v. *Marquez*, 319 F. Supp. 1016 (S.D.N.Y. 1970).[9]

The reason for this rule is clear. "Plainly, the [adverse] inference may not ordinarily be made against a party when a witness for that party claims a privilege personal to the witness, for this is not a matter under the party's control." *McCormick on Evidence* § 76, at 155 (2d ed. 1972). *See also* 8 J. Wigmore, *Evidence* § 2272,

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ference against parties who did *not* refuse to testify. Rather, the decision supports the decision below.

[8] The District Court continued:

> The case has been pending a long time and plaintiff had ample opportunity to amend the Complaint. Having made the choice, the plaintiff is governed by the rule that the fact that a witness has invoked the Fifth Amendment may not be brought to the attention of the jury. To hold otherwise would permit a named defendant to be unfairly prejudiced by a trial tactic that is unjustified.

J.A. 93a.

[9] *See also* Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322, 331 (1966) ("no inference adverse to either party may be drawn from the refusal of a non-party witness to testify"); *Hinds* v. *John Hancock Mut. Life Ins. Co.*, 155 A.2d 721, 735 (Me. 1959); *State* v. *Reed*, 253 A.2d 227, 230 (Vt. 1969).

at 437 (McNaughton rev. ed. 1961) ("an inference against the party is not to be made because of the witness' claim of privilege").[10] The witness' refusal to testify deprives both parties of his testimony. In the instant case, King was not subject to the control of either party, and neither side should suffer from an adverse inference drawn from his refusal to testify.[11]

Further, as established by the record, King was the target of an extensive and unfocused grand jury investigation. JA 94a, 116a-120a. In these circumstances, any adverse inference in connection with the specific transactions at issue in this case would not be justifiable. As recognized in *United States* v. *Tomaiolo*, 249 F.2d 683, 691 (2d Cir. 1957), when an individual believes that he may be indicted, "it is perfectly consistent with innocence and with nonincriminatory answers to particular questions to refuse to answer any question at all."[12]

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[10] By contrast, Wigmore notes that "[t]he rule does not preclude the inference where the privilege is claimed by a *party to a civil cause*. *Id.* at 438 (emphasis in original).

[11] As observed by Judge Weinfeld in *United States* v. *Marques*:

> A witness who claims his Fifth Amendment privilege exercises a personal right, independent of the prosecution or the defense and is in no way subject to their control. The assertion of a constitutional right which deprives both sides of the witness' testimony should give rise to no inference, favorable or unfavorable, with respect to the nature of the witness' answer had he testified. If in fact the invocation of the Fifth Amendment privilege is of such dimension that it permits no inference of guilt or criminal proclivities, it is without probative value on the issue of the defendant's guilt or innocence . . . .

319 F. Supp. at 1022.

[12] The court further observed:

> Insofar as guilt or innocence is concerned, it is clear that claiming the privilege does not imply any guilt which would be at all inconsistent with later protestations or indications of innocence.

249 F.2d at 691, *following Grunewald* v. *United States*, 353 U.S. 391, 421, 423 (1957).

E. H. Boerth Co. v. *LAD Properties*, 82 F.R.D. 635, 644-45 (D. Minn. 1979), cited in Pet at 7, n.*, is consistent with and, indeed, supports the decision below. There, a witness who was an employee of each of two defendant companies (but was not an employee of the third defendant, an individual) testified in general as to his duties and position with the defendant companies, but refused to answer specific inquiries regarding his knowledge of the financing transactions at issue. The court instructed the jury it could draw an adverse inference against the witness' two employers, *but not against the other co-defendant.* Both the fact of agency and the fact that the refusal to testify was limited to the specific transactions at issue supported the adverse inference against the employers, and both facts distinguish that part of the holding from the circumstances of the instant case; the refusal to permit an inference against the third defendant supports the decision below in the instant case.[18] *United States* v. *Mammoth Oil Co.*, 14 F.2d 705, 729-30 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927), and *Molloy* v. *Molloy*, 46 Wis. 2d 682, 176 N.W. 292 (1970), also cited in the same footnote in the Petition, both involved a failure to testify by a *party*.

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[18] The agency principle used to justify the adverse inference in *Boerth* and in *Ralph Hegman Co.* v. *Transamerica Ins. Co.*, 198 N.W.2d 555 (Minn. 1972) (principal-surety), and *Labor Relations Commission* v. *Fall River Educators Ass'n*, 416 N.E.2d 1340, 1344-45 (Mass. 1981) (employer-employee), both cited in Pet. at 8, n.*, does not apply to the instant case. King was not an agent of either the WBC or Sulaiman. There was no finding, and no basis for a finding, that his assertion of the privilege was during the pendency, or in furtherance, of any conspiracy or served the interests of the WBC and Sulaiman, as distinct from King's own interests with respect to the ongoing grand jury investigation of him. And, as recognized in the Notes of the Advisory Committee on Proposed Rules to Fed. R. Evid. 801(d)(2)(E), "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." *See also* 4 *Weinstein's Evidence*, § 801(d)(2)(E), at 801-168 to 801-171.

Consequently, both the District Court and the Court of Appeals were correct in holding that King's refusal to testify did not warrant an adverse inference against the WBC or Sulaiman. Petitioner has not cited any case to the contrary, and respondents are aware of none.

II. THE ISSUE OF THE SUFFICIENCY OF THE EVIDENCE ON THE CONSPIRACY CLAIM WAS CORRECTLY DECIDED BELOW AND DOES NOT WARRANT THE GRANT OF THE WRIT.

Petitioner seeks review by this Court of the granting of a directed verdict on the conspiracy claim at the close of petitioner's case. The District Court held a full and focused hearing before granting the directed verdict. The Court of Appeals exhaustively considered the evidence and the inferences available therefrom (see Pet. at 1757-70) before affirming. As the opinion of the Court of Appeals demonstrates, petitioner simply did not present evidence sufficient to raise a jury issue as to the claim of conspiracy.

Petitioner does not contend that the Court of Appeals applied any incorrect standard or misapplied any applicable rule or principle, or placed itself in conflict with any other circuit, in affirming the judgment of the District Court.[14] Rather, what petitioner wants is a third evaluation of evidence that has twice been found insufficient by the lower courts. That is not what the writ of certiorari is for.

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[14] The citation (Pet. at 10-11) to *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 50 U.S.L.W. 4512 (U.S. May 17, 1982), is inapt. The issue there was whether a non-profit industry association could be held civilly liable for the acts of its agents committed with apparent authority, and the Court held that it could be. In the instant case, no issue of actual or apparent authority is raised. Nor did the *Hydrolevel* case involve any issue concerning the granting of a directed verdict due to the insufficiency of the evidence as to an alleged conspiracy.

III. THE ISSUE OF PER SE ILLEGALITY AS POSED BY PETITIONER IS NOT PRESENTED BY THE RECORD IN THIS CASE, AND PETITIONER'S CLAIM OF PER SE ILLEGALITY IS WITHOUT MERIT.

A. The Issue Posed by Petitioner is Not Presented by the Record in this Case.

The third issue, as posed by petitioner, is whether it was unlawful *per se* for the WBC "to condition a boxing promoter's ability to promote championship contests upon the promoter's payment of money to his competitor." Pet. at ii. That issue is not presented in this case because the respondents did not impose any such condition.

The facts relevant to this issue are set out in the opinion of the Court of Appeals. Pet. at 1757-70. The key facts are these. The WBC had been asked by Don King to approve matches to be promoted by him between Alexis Arguello, the WBC superfeatherweight champion, and Alfredo Escalera and Bobby Chacon. The WBC had, instead, directed Arguello to defend his title next against the number one challenger, Rafael Limon. At that point, Brenner approached the WBC seeking approval of an Arguello-Escalera match to be promoted by him. The WBC—seeking to help Brenner, as the Court of Appeals pointed out—approved Brenner's bout on three conditions: that Limon agree, that the bout not be postponed, and that Brenner resolve the conflicting claims of King, either through court action or otherwise. Brenner sued King, but failed to win a judgment. He commenced negotiations with King, but they stalled. Brenner then enlisted Sulaiman's help, and Sulaiman mediated between King and Brenner until an agreement was reached, under which Brenner was to pay King $25,000. Prior to the bout, Brenner sent King a check post-dated to the day after the bout. King complained to Sulaiman and asked him to cancel the WBC's certification of the bout as a WBC Championship bout. Sulaiman refused, but called Brenner

shortly before the bout to ask for an explanation. Brenner, not telling Sulaiman about his continuing dispute with King (and thus his failure to comply with the conditions for WBC approval of his bout), assured Sulaiman there was no problem, and promised to pay King the money after the fight. On the basis of Brenner's representations, Sulaiman committed to King that Brenner's check would be paid. Tr. 872-73. Prior to the bout Brenner stopped payment on the check, without telling Sulaiman or King. The bout was held without Brenner having paid King, as he had agreed to do. Sulaiman sought an explanation from Brenner, but was unable to obtain one. Subsequently, after notice and an opportunity to appear, which Brenner disregarded, Brenner was suspended for having violated his commitment to the WBC and for other violations of the WBC rules.

The question posed by petitioner depends on a finding that the WBC conditioned Brenner's right to promote WBC bouts on his payment of money to King. No such finding has been made in either the District Court or in the Court of Appeals, nor would any such finding be supported by the record because that simply is not what happened. As the Court of Appeals pointed out:

> [T]he record belies Brenner's assertion that he was compelled to settle with King. The [WBC] convention gave Brenner a choice, to resolve the dispute either in court or by settlement. Brenner pursued both paths, soliciting Sulaiman's aid in negotiating with King while he was seeking a court injunction against King. Only when his litigation failed did he agree to a settlement.

Pet. at 1769. Thus the issue posed by petitioner is not presented by this case.

B. The Claim of Per Se Illegality is Without Merit.

The law applicable to disciplinary actions by sports organizations is summarized in the opinion of the Court

of Appeals. Pet. at 1770-72.[13] The Court of Appeals, like the District Court, correctly applied that body of law in the instant case. Petitioner does not allege any conflict among the circuits or any difficulty in the application of this well-settled and well-understood body of law.

The Court of Appeals held that the District Court had instructed the jury properly on the standards applicable to disciplinary actions. Pet. at 1772-73. It held that the grounds asserted for the disciplinary action were legally sufficient. *Id.*, 1773-74. The jury found the facts against Brenner. All these determinations were properly made.

Petitioner asserts that the Court of Appeals found "that the WBC suspended Brenner principally because Brenner did not compromise a spurious contract claim asserted by King." Pet. at 13. The Court of Appeals made no such finding. Rather, it stated the four asserted bases for the suspension, Pet. at 1774, n.9, and it commented: "[W]e cannot conclude that Brenner's failure to honor his agreements *with the WBC* or with *its rules* were improper bases under Section 1 of the antitrust laws for suspending him from promoting WBC world title fights." *Id.* 1774 (emphasis added). As the jury presumably found from the overwhelming evidence, Brenner was suspended not because he failed to make a payment to King, but because he violated the rules of the WBC.

There is nothing here that warrants plenary review by the Court.

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[13] *See also* J. Weistart & C. Lowell, *The Law of Sports* 642-87 (1979); *Government and the Sports Business* 395-402 (R.G. Noll, ed. 1974); 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 6I.07[2], at 6I-50 to 6I-54 (1981).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD M. COOPER
(Counsel of Record)
ELLEN S. HUVELLE
WILLIAMS & CONNOLLY
Hill Building
839 Seventeenth St., N.W.
Washington, D.C. 20006
(202) 331-3017
Attorneys for Respondents.

APPENDIX

APPENDIX

Theodore Brenner d/b/a Teddy Brenner Enterprises v. World Boxing Council and Jose Sulaiman Chagnon, 80 Civ. 892 (CMM)

This is a motion by defendants for an order excluding from evidence Don King's invocation of the privilege of self-incrimination.

This motion is granted. Mr. King was deliberately not named a party defendant and is merely a witness on the trial. The case has been pending a long time and plaintiff had ample opportunity to amend the complaint. Having made the choice, the plaintiff is governed by the rule that the fact that a witness has invoked the Fifth Amendment may not be brought to the attention of the jury. To hold otherwise would permit a named defendant to be unfairly prejudiced by a trial tactic that is unjustified.

So ordered.

Dated: New York, N.Y.
April 7, 1981

CHARLES M. METZNER
U.S.D.J.

[retyped to enhance legibility]

* * * *

[787-95] THE COURT. All right.

MS. OSTRAGER: Your Honor, may I be heard one more time?

I'm sorry if I misspoke or I didn't make it clear.

The point that I was making was that no promoter had signed both fighters for the Arguello-Limon bout which eventually took place on July 8, 1979. Arguello had not yet signed with any promoter. He hadn't signed as of May 9th, the day that Mr. Sulaiman sent the telegram telling Mr. Arguello's representative that Arguello had to fight a mandatory defense in Madison Square Garden.

THE COURT: Nothing has been submitted to me to justify my changing my ruling of Monday, that there are no facts in this record from which a jury may draw a reasonable inference that a conspiracy existed between King and Sulaiman to have the World Boxing Council suspend Brenner and restrain competition in the field of boxing promotion.

The evidence produced under oath before this jury would justify a finding that King is not to be trusted. He, of course, is free to testify under oath before this [787-96] jury to dispute plaintiff's proof.

On this motion, however, we look at the state of the record.

Even with the undisputed testimony offered by plaintiff, King's activities do not reflect that he and Sulaiman conspired together to violate the antitrust laws as alleged and bringing damage to Brenner.

This claim against the defendant Brenner and the World Boxing Council is dismissed.

MR. COOPER: I assume, your Honor, that also knocks out the second triable issue, which was whether the suspension was pursuant to a conspiracy.

MS. OSTRAGER: Your Honor, I don't think that contention goes out.

THE COURT: No, of course not.

Mr. COOPER: It goes out as to the theory of conspiracy. There is a remaining theory as to why the suspension violated the antitrust laws, and I will address that if I may.

The COURT: The conspiracy is in relation to the antitrust laws, and whether you call it conspiracy or combination makes no difference.

MR. COOPER: Okay.

• • • •

[554] (Recess)

(In the robing room)

THE COURT: I have asked you to come in because I was doing some thinking about comments I made I think yesterday morning or Wednesday evening about the effect of King's taking the Fifth.

As I understand it, Mr. King was originally called for deposition and refused to appear. You then obtained an order to make him appear to assert the privilege to individual questions. Is that correct?

MS. OSTRAGER: Your Honor, originally he refused to appear at all. Then we obtained an order that he had to appear. When he did appear, he asserted a blanket privilege and terminated the deposition. Then I obtained an order to show cause to have him reappear and answer specifically.

THE COURT: All right.

That went on for two days in your attempt to get him to answer questions. I gather from my law clerk that he took the Fifth Amendment over 350 times in that two-day period.

Based on this and the representation by his counsel that he would reassert the Fifth if he appeared on the trial, I directed that he not be [555] put on the stand to go through the same charade that was gone through in March. At the same time I ruled that he had properly invoked the Fifth Amendment to the questions that were asked, and an order has been entered to that effect and sealed.

I have come to the conclusion that the jury has to be charged that he is equally unavailable to both sides and that no inference may be drawn by the jury because of his absence. I would like to read out the charge I am going to give to the jury in this regard:

"You may wonder why Mr. King has not appeared here as a witness. I must instruct you that he was equally unavailable to both sides as a witness in this case. Consequently, you should not speculate as to what testimony he would have given if he appeared as a witness in this case. You shouldn't assume or infer that his testimony would have been favorable or unfavorable to the plaintiff or favorable or unfavorable to the defendant. In short, you should utterly disregard his possible testimony as a factor in this case."

That charge has been given in a criminal case with [sic] the prospective witness had taken the Fifth. [556] It has been approved by the Court of Appeals of this circuit.

MR. ELDRIDGE: May I have the citation that you have reference to?

THE COURT: I don't know it. It is my case, but I don't know the citation.

If you find any authority to the contrary, I am perfectly willing to review the ruling. But I think it is the correct ruling.

MR. ELDRIDGE: Thus far, the only cases that we have been able to locate are by analogy, the principal surety or agency relationship where there is a civil situation as opposed to the criminal case, Your Honor.

I think your suggested charge is the normal rule in a criminal case. I think the rule is different or should be different in a civil case. I have not found an antitrust conspiracy case—

THE COURT: Let's not go into that. I am saying this is the way I am going to rule. If you have any authority to the contrary, I will entertain it.

MR. ELDRIDGE. We will do our best over the weekend, your Honor.